No. 78-776

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

MILTON DEAN BATCHELDER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 581 F.2d 626.

JURISDICTION

The judgment of the court of appeals (Pet. App. 32a-33a) was entered on July 24, 1978. A petition for rehearing was denied on September 12, 1978 (Pet. App. 34a-35a). On Oetober 2, 1978, Mr. Justice

Stevens extended the time for filing a petition for a writ of certiorari to and including November 11, 1978. The petition for a writ of certiorari was filed on November 10, 1978, and was granted on January 8, 1979 (A. 17). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the prison sentence imposed on a defendant convicted under 18 U.S.C. 922(h), which carries a maximum five-year term, must be limited to two years if his conduct also violated 18 U.S.C. App. 1202(a), which carries only a two-year term.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. 18 U.S.C. 921(a) provides in pertinent part:

> As used in this chapter—
>
> * * * * *
>
> (14) The term "indictment" includes an indictment or information in any court under which a crime punishable by imprisonment for a term exceeding one year may be prosecuted.
>
> (15) The term "fugitive from justice" means any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding.
>
> * * * * *
>
> (20) The term "crime punishable by imprisonment for a term exceeding one year" shall not include (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices as the Secretary may by regulation designate, or (B) any State offense (other than one involving a firearm or explosive) classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

3. 18 U.S.C. 922(h) provides:

> It shall be unlawful for any person—
>
> (1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> (2) who is a fugitive from justice;
>
> (3) who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or
>
> (4) who has been adjudicated as a mental defective or who has been committed to any mental institution;

to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

4. 18 U.S.C. 924(a) provides:

> Whoever violates any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or in applying for any license or exemption or relief from disability under the provisions of this chapter, shall be fined not more than $5,000, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine.

5. 18 U.S.C. App. 1202(a) provides:

> Any person who—
>
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or
>
> (2) has been discharged from the Armed Forces under dishonorable conditions, or
>
> (3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or
>
> (4) having been a citizen of the United States has renounced his citizenship, or
>
> (5) being an alien is illegally or unlawfully in the United States,
>
> and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more two years, or both.

6. 18 U.S.C. App. 1202(c) provides in pertinent part:

> (2) "felony" means any offense punishable by imprisonment for a term exceeding one year, but does not include any offense (other than one involving a firearm or explosive) classified as a misdemeanor under the laws of a State and punishable by a term of imprisonment of two years or less;

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Illinois, respondent, who had previously been convicted of a felony, was convicted of unlawfully receiving a firearm that had been transported in interstate commerce, in violation of 18 U.S.C. 922(h). Pursuant to 18 U.S.C. 924(a), he received a sentence of five years' imprisonment. The court of appeals affirmed respondent's conviction, but, by a divided vote, the panel vacated the district court's judgment and remanded the case for resentencing, concluding that the maximum allowable sentence in this case was two years' imprisonment (Pet. App. 1a-31a).[1]

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[1] By order of the Chief Justice, the mandate of the court of appeals has been stayed pending resolution of this case by the Court. *United States* v. *Batchelder*, No. A-561 (Dec. 29, 1978).

1. The evidence at trial showed that on July 22, 1975, Russell Koch, an undercover agent of the Bureau of Alcohol, Tobacco and Firearms, accompanied an informant to Carl's Bar in Belleview, Illinois, where respondent was employed (Tr. 58-59). Agent Koch overheard respondent, who had been convicted of a felony in 1960,[2] tell someone in the bar that he had a firearm that the government didn't know about (Tr. 60). Two days later, Koch and the informant returned to the bar, at which time respondent showed them a .38 caliber revolver that he was wearing in a waist holster. Respondent offered to loan the revolver to them for a particular "job" and said they would have to pay him $110 if they had to discard the gun (Tr. 61-64). One week later Koch returned to the bar and purchased the revolver from respondent for $70 (Tr. 64-65). During the course of this transaction respondent told Koch "that the gun had come from a burglary in St. Louis" (Tr. 65). Respondent stipulated that the revolver had been shipped from Massachusetts to Missouri in 1948 (Tr. 57).[3]

2. On appeal the court affirmed respondent's conviction, but a divided panel reversed and remanded for resentencing to a maximum term of two years'

[2] Respondent had pleaded guilty to murder in 1960 and thereafter had served approximately 13 years of a 25-year sentence. At trial, respondent stipulated that he had previously been convicted of a crime punishable by imprisonment for a term exceeding one year (Tr. 57).

[3] Respondent admitted receiving the firearm; his defense at trial was that he had been entrapped by the government's informant (Tr. 117-123).

imprisonment. The majority opinion acknowledged that respondent had been indicted and convicted under 18 U.S.C. 922(h) and that 18 U.S.C. 924(a) clearly provides that such an offense is subject to a maximum penalty of five years' imprisonment, or a fine of $5,000, or both. The majority observed, however, that the substantive elements of Section 922(h) —at least as applied to a convicted felon who unlawfully receives a firearm—are identical to those of 18 U.S.C. App. 1202(a), which provides for a maximum sentence of only two years' imprisonment (Pet. App. 4a & n.2). The court concluded that, in these circumstances, it was "impermissible to sentence a defendant to five years under Section 922(h) when he could receive only a two-year maximum sentence under Section 1202(a)" (*id.* at 4a-5a).

In deciding that respondent could receive only the two-year maximum sentence provided by Section 1202(a) rather than the five-year maximum found in Section 924(a), the court relied upon three general principles of statutory construction. First, because in its view the different penalty provisions found in Sections 924(a) and 1202(a) "arguably contradict each other and therefore leave the intent of the legislators ambiguous," the court applied the doctrine of lenity, resolving the ambiguity in favor of the criminal defendant (Pet. App. 7a). Second, the court indicated that insofar as Section 1202(a) could be considered to represent "Congress' last word on the issue of penalty," it constituted an implied repeal of

Section 924(a) (Pet. App. 7a-8a). Finally, recognizing that "these first two principles cannot be applied to these facts without some difficulty," the majority relied on the maxim that if fairly possible a court should interpret a statute to avoid substantial constitutional issues (Pet. App. 8a-9a). Because the court found that "two statutes that are identical except for their penalty provisions" might violate notions of due process and equal protection (Pet. App. 9a-16a), it construed Sections 922(h) and 1202(a) "as limiting imprisonment to a maximum of two years for the offense of receiving a firearm by a convicted felon" (Pet. App. 8a-9a).

Judge McMillen dissented from the vacation of respondent's sentence, finding persuasive "the long line of cases * * * which hold that where an act may violate more than one criminal statute, the government may elect to prosecute under either, even if the defendant risks the harsher penalty, so long as the prosecutor does not discriminate against any class of defendants" (Pet. App. 24a). Judge McMillen conceded that this rule "is most often stated in terms of two statutes prohibiting the same act but requiring different elements of proof," but he could see no argument that "the prosecutor's discretion is any less when statutes also overlap on the question of punishment, if the defendant's behavior can render him subject to indictment under either section" (*id.* at 24a-25a).

SUMMARY OF ARGUMENT

Respondent, who had previously been convicted of a felony, was indicted and convicted on a charge of unlawfully receiving a firearm in violation of 18 U.S.C. 922(h). He was sentenced to five years' imprisonment, the maximum term provided by 18 U.S.C. 924(a). It is not here disputed either that respondent's conduct violated Section 922(h) or that Section 924(a) by its express terms constitutes the penalty provision applicable to violations of Section 922(h). Nonetheless, because respondent's conduct also violated 18 U.S.C. App. 1202(a), which carries a maximum term of two years' imprisonment, the court of appeals concluded that, as a matter of statutory construction, respondent could not be sentenced to more than two years' imprisonment. That conclusion is erroneous.

I.

Sections 922(h) and 924(a) were enacted together in Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, as part of a comprehensive federal scheme of firearm control. In particular, Section 922(h) prohibits several categories of individuals, including convicted felons, from receiving firearms. And Section 924(a) provides without exception that violations of Section 922(h) and the other provisions of Title IV are punishable by up to five years' imprisonment, or $5,000 in fines, or both.

Nothing in the language or structure of Section 1202(a) suggests that its two-year maximum penalty

overrides the express terms of Section 924(a). Rather, Section 1202(a) is an independent and self-contained federal gun control statute that both delineates criminal conduct and provides for its punishment without reference to Title IV. The conduct prohibited by Section 1202(a) overlaps somewhat with the activities barred by Section 922(h), but the two statutes are far from coextensive. Section 922(h) and Section 1202(a) each covers categories of persons and reaches kinds of conduct not addressed by the other. In addition, Section 1202(a) contains a less rigorous interstate commerce element than Section 922(h). These differences in statutory scope emphasize the independent operation of the two statutes.

The pertinent legislative history confirms that Congress intended Section 924(a) and not Section 1202(a) to govern sentencing for violations charged under Title IV. Section 1202(a), which was enacted simultaneously with Title IV, is the core provision of Title VII of the Omnibus Act. Because Title VII was added as a last-minute amendment to the Omnibus Act, the original legislative reports make no mention of its content. However, Senator Long, the sponsor of Title VII, specifically stated that Section 1202 was to "take nothing from" but rather "add to" Title IV. 114 Cong. Rec. 14774 (1968). Moreover, the same Congress that enacted the Omnibus Act also thereafter amended Titles IV (including Section 924(a)) and VII in the Gun Control Act of 1968. The legislative reports accompanying these amendments clearly reflect Congress' understanding that

the substantive and penalty provisions of the two statutes were independent of one another. See, *e.g.*, H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. 31, 34 (1968).

Since Section 924(a) unambiguously controls the appropriate range of punishment applicable to the offense of which respondent was convicted, there is no occasion to apply the principle of lenity. Indeed, the decision of the court below creates anomalous results and defeats the obvious intention of the legislature. Nor is the decision of the court of appeals justified as a means of avoiding serious constitutional issues. The overlapping coverage of Sections 922(h) and 1202(a) does not raise substantial constitutional questions, and in any event the court's rewriting of the federal gun laws is not a "fairly possible" construction of Sections 924(a) and 1202(a). See *Swain* v. *Pressley*, 430 U.S. 372, 378 n.11 (1977). Furthermore, since Sections 1202(a) and 924(a) were simultaneously enacted and subsequently re-enacted, neither could be held to have effected an implied repeal of the other.

II.

The court of appeals suggested that overlapping criminal provisions that carry different penalties may be unconstitutional. However, it is by no means uncommon or even undesirable for criminal statutes to overlap, and there is no basis in law for concluding that an overlap such as that presented here constitutes a denial of due process.

A. Title IV is not void for vagueness. On the contrary, Section 922(h) defines with clarity those persons who are prohibited from receiving firearms. Indeed, respondent essentially contends that the federal gun laws are too specific insofar as he clearly violated two separate statutes. Concomitantly, Section 924(a) unambiguously sets forth the applicable punishment. Neither the court of appeals nor respondent has identified what words or phrases in Title IV are vague or ambiguous, and such a specific criminal statute cannot be rendered void for vagueness merely because it overlaps with another unambiguous and independent criminal provision.

B. The prosecutorial discretion incident to the existence of overlapping criminal provisions does not in and of itself violate constitutional norms. Based on the doctrine of separation of powers and the practical difficulties inherent in judicial review of prosecutorial decisions, this Court has repeatedly stated that the prosecutor's decision to file charges and to proceed under one statute rather than another is not generally subject to judicial review. Just as the prosecutor has acknowledged discretion to decide such matters as whether or not to charge at all, whether to charge a greater or a lesser offense, or whether to charge one or more of a group of related offenses, so too the prosecutor may constitutionally elect to charge either of two overlapping or even identical criminal statutes. Indeed, the only constitutional limitation on the exercise of the prosecutor's discretion with regard to charging matters is that

his decisions not be motivated by invidiously discriminatory factors such as race or religion.

C. Finally, there is no merit to the related suggestion that the overlap between Sections 922(h) and 1202(a) somehow amounts to an unconstitutional delegation of Congress' duty to affix punishment to criminal statutes. Titles IV and VII contain precise penalty provisions that do not leave the courts to guess at the range of punishment deemed appropriate by Congress. To the contrary, it is the decision below that infringes both upon Congress' power to affix punishment to federal criminal laws and upon the Executive's broad discretion to enforce those statutes.

ARGUMENT

This case focuses on the interaction between Titles IV and VII of the Omnibus Crime Control and Safe Streets Act of 1968 ("Omnibus Act"), Pub. L. No. 90-351, 82 Stat. 225-235, 236-237, as modified by the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213-1236. Although the coverage of these statutes overlaps to some extent, each Title prohibits differing categories of potentially dangerous people from obtaining firearms, and each Title contains a specific penalty provision that by its unambiguous terms controls sentencing questions arising under that particular Title. Compare 18 U.S.C. 924(a) with 18 U.S.C. App. 1202(a). Indeed, the language, structure and legislative history of these statutes all point unequivocally to the conclusion that Titles IV and VII are self-contained statutory schemes that

Congress intended to be enforced independently of each other. Nonetheless, the court below held, as a matter of statutory construction, that where, as here, a defendant's conduct violates both Titles, he may be sentenced only in accordance with the lesser two-year maximum penalty found in Title VII, regardless of the statute under which he was prosecuted.

In point I of this brief, we show that this conclusion constitutes an unwarranted rewriting of the federal gun laws in direct conflict with Congress' manifest intent. In point II, we address the constitutional concerns, chimerical in our view, that appear to have prompted the court of appeals' strained construction of the statutes.

I. THE FEDERAL GUN CONTROL LAWS UNAMBIGUOUSLY AUTHORIZE THE IMPOSITION OF A SENTENCE OF UP TO FIVE YEARS' IMPRISONMENT FOR A VIOLATION OF SECTION 922(h)

It is beyond cavil that the language of Section 924(a) explicitly and unambiguously permits the sentence of five years' imprisonment that was imposed upon petitioner for his receipt of a firearm in violation of Section 922(h). Few indeed are the circumstances in which a court may appropriately refuse to uphold a statutory directive as plain and concise as that construed out of existence by the court of appeals in this case. See *Director, Office of Workers' Compensation Programs* v. *Rasmussen*, No. 77-1465 (Feb. 20, 1979), slip op. 7, 17. Perhaps such judicial reconstruction of an unambiguous stat-

ute would be warranted when application of the statute as written would produce absurd results or when the statutory directive is flatly contradictory to some other portion of the same or of another statute. Such a result may also be justified if clear evidence of legislative intent demonstrated that the seemingly unambiguous statutory command was a mistake. Here, however, the plain language of Section 924(a) is in fact reinforced by an analysis of the structure and history of the pertinent provisions of the federal gun control laws. In such circumstances, neither the principle of lenity nor the distant specter of possible constitutional issues entitles the courts to construe the statutes at issue in a manner plainly at odds with their terms and purposes.

A. The Language And Structure Of The Federal Gun Control Laws Make Clear That A Violation Of Section 922(h) Is Punishable In Accordance With Section 924(a) And Not Section 1202(a)

1. Title IV represents a comprehensive scheme of federal firearm regulation and registration that seeks "broadly to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous." *Barrett* v. *United States*, 423 U.S. 212, 218 (1976); see *Scarborough* v. *United States*, 431 U.S. 563, 570 (1977); *Huddleston* v. *United States*, 415 U.S. 814, 824 (1974); S. Rep. No. 1501, 90th Cong., 2d Sess. 22-23 (1968); S. Rep. No. 1097,

90th Cong., 2d Sess. 28 (1968).[4] In particular, Title IV focuses upon four distinct categories of "potentially irresponsible and dangerous" people: (1) persons, such as respondent, who are under indictment for, or who have been convicted of, "a crime punishable by imprisonment for a term exceeding one year";[5] (2) fugitives from justice;[6] (3) addicts and unlawful users of various controlled substances;[7] and (4) the mentally incompetent.[8] Thus, Section 922(d) prohibits licensed gun dealers from knowingly selling, or otherwise disposing of firearms to any person in the four enumerated categories. Simi-

[4] At the core of Title IV is a licensing scheme. Each person engaged in the business of importing, manufacturing, transporting, selling, or otherwise dealing with firearms must procure a federal license. 18 U.S.C. 923, 922(a)-922(c). Federal licensees must keep detailed records of all their transactions, including special forms that must be filled out by every person buying or acquiring a firearm. See *Huddleston* v. *United States, supra,* 415 U.S. at 816; see also 18 U.S.C. 922(b)(5), 922(c), 922(m), and 923(g).

[5] 18 U.S.C. 922(d)(1), 922(g)(1), and 922(h)(1). The phrase "a crime punishable by imprisonment for a term exceeding one year" is further defined to exclude certain antitrust and business crimes, and crimes not involving firearms if classified by a state as a misdemeanor and punishable by no more than two years' imprisonment. 18 U.S.C. 921(a)(20). See 27 C.F.R. 178.11.

[6] 18 U.S.C. 922(d)(2), 922(g)(2), and 922(h)(2).

[7] 18 U.S.C. 922(d)(3), 922(g)(3), and 922(h)(3).

[8] 18 U.S.C. 922(d)(4), 922(g)(4), and 922(h)(4). In addition to the four groups of potentially dangerous persons described above, Section 922(b)(1) precludes licensees from selling handguns to persons under 21 years of age and any firearm to persons under 18 years of age. (It is not unlawful, however, for such underaged persons to receive firearms).

larly, Sections 922(g) and 922(h) bar persons falling within the four categories from transporting or receiving any firearm, respectively.[9]

Besides detailing with clarity the types of persons prohibited from receiving firearms, Title IV also unambiguously and expressly sets forth the appropriate range of punishment applicable to those convicted of violating Section 922(h) (as well as 922(d) and 922(g)). Section 924(a) provides that "[w]hoever violates any provision of this chapter * * * shall be fined not more than $5,000, or imprisoned not more than five years, or both * * *." No exception appears on the face of Section 924(a), and the language and legislative history of Title IV make clear beyond peradventure that Section 922(h) is part of the "chapter" plainly subject to the penalty provisions of Section 924(a). See 82 Stat. 226, 234; S. Rep. No. 1097, 90th Cong., 2d Sess. 20-25 117 (1968). Accord, *United States* v. *Wright*, 581 F.2d 704 (8th Cir. 1978), cert. denied, No. 78-

[9] These provisions differ slightly with regard to their interstate commerce element. Section 922(g) prohibits transportation of firearms in commerce, whereas Section 922(h) proscribes receipt of a firearm that has at some time traveled in interstate commerce—a substantially less rigorous prerequisite to prosecution. See *Barrett* v. *United States, supra;* see also *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186 (1974) (construing "in commerce" language of the Clayton and Robinson-Patman Acts). Here, for example, respondent stipulated that the pistol in issue had been manufactured in Massachusetts and shipped to Missouri in 1948 (Tr. 57). (In addition, the evidence indicated that respondent had actually received the pistol following a burglary in St. Louis (Tr. 65).)

5429 (Jan. 15, 1979); *United States* v. *Musgrove*, 581 F.2d 406 (4th Cir. 1978); *United States* v. *Thrasher*, 569 F.2d 894 (5th Cir. 1978); *United States* v. *Phillips*, 522 F.2d 388, 393 (8th Cir. 1975); *United States* v. *Fournier*, 483 F.2d 68 (5th Cir. 1973); *Mauney* v. *United States*, 454 F.2d 273 (6th Cir. 1972); *United States* v. *Panetta*, 436 F. Supp. 114, 129 n.31 (E.D. Pa. 1977).[10] See also *Barrett* v. *United States*, *supra*, 423 U.S. at 215 (three-year sentence for violation of 18 U.S.C. 922(h)); *United States* v. *Carr*, 584 F.2d 612, 614 (2d Cir. 1978), cert. denied, No. 78-984 (Feb. 26, 1979) (same).

2. Although the court of appeals recognized that respondent had been prosecuted under Section 922(h) and that Section 924(a) "provides [the punishment] for violations of Section 922" (Pet. App. 3a), it nevertheless concluded that the maximum penalty provided in Section 1202(a) overrides the plain terms of Section 924(a). We submit that this ruling is not supportable. Certainly there is nothing in the language or structure of Section 1202(a) that suggests that its two-year maximum penalty provision is applicable to any criminal prosecution other than one brought under Section 1202.[11] Con-

[10] The Third Circuit has also apparently rejected the position taken by the court below. See *United States* v. *Goodroe*, No. 76-2252 (3d Cir. Feb. 28, 1977) (unpublished order; disposition of case reported at 549 F.2d 797), cert. denied, 434 U.S. 1062 (1978).

[11] The court of appeals declined to decide whether the maximum $5,000 fine in Section 924(a) or the maximum $10,000 fine in Section 1202(a) governed the sentences of defendants whose conduct violates both provisions.

spicuously absent in that provision is an express cross-reference to Sections 922 and 924. Indeed, insofar as Section 1202(a) states both the conduct prohibited and the potential punishment accorded the crime, it appears to constitute a self-contained gun control provision unconnected to, and independent from, Title IV. See Note, *Prior Convictions and the Gun Control Act of 1968*, 76 Colum. L. Rev. 326, 327 (1976). The conclusion that Congress purposefully enacted two separate gun control provisions, each fully enforceable on its own terms, is further buttressed by the substantial differences in coverage between the two statutes.

a. Section 1202(a) proscribes the receipt, possession, or transportation of firearms by five categories of presumptively dangerous people: convicted felons (subsection (1)); persons dishonorably discharged from the Armed Forces (subsection (2)); mental incompetents (subsection (3)); persons who have renounced their American citizenship (subsection (4)); and illegal aliens (subsection (5)). Section 1202(a) thus imposes a disability on three groups (dishonorable dischargees, ex-citizens, and illegal aliens) that are not subject to Section 922(h); conversely Section 922(h) alone prohibits the receipt of firearms by fugitives from justice and by drug addicts and users.

Moreover, even the subsections of the two statutes that overlap are far from co-extensive. Section 922(h)(1) includes those currently under indictment for a felony as well as those who have been convicted,

but excludes from its coverage certain white collar crimes. See 18 U.S.C. 922(h)(1), 921(a)(20). In contrast, Section 1202(a) neither covers indictees nor exempts antitrust violators and the like.[12] Similarly distinguishable are the respective provisions concerning the mentally defective.[13] In short, "although subsections of the two Titles do address their prohibitions to some of the same people, each statute also reaches substantial groups of people not reached by the other." *United States* v. *Bass*, 404 U.S. 336, 342 (1971) (footnote omitted).

b. Furthermore, the range of activities proscribed by the two statutes is also not coterminous. Section 922(h) forbids the receipt of firearms and ammunition. Section 1202(a), on the other hand, deals only with firearms and not ammunition, but it prohibits possession and transportation as well as receipt.[14] The latter two elements differ substantially

[12] Other differences may exist. For example, Section 922(h) refers to a felony indictment or conviction in any court (*i.e.*, including those of foreign countries) whereas Section 1202(a) is limited to felony convictions obtained in federal or state courts.

[13] Section 922(h)(4) places a disability on anyone "who has been adjudicated as a mental defective or who has been committed to any mental institution." Section 1202(a)(3) merely applies to anyone who "has been adjudged by a court * * * of being mentally incompetent * * *." Commitment does not necessarily entail a court adjudication of mental incompetence. See, *e.g.*, H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. 30 (1968).

[14] To some extent, this difference is offset by Section 922(g), which prohibits transportation. However, that provision appears to require proof of transportation "in commerce." See

from receipt. For example, suppose an individual received a weapon in 1971, was convicted of a felony in 1972, and continued to possess the weapon in 1973. He would not have violated Section 922(h), because at the time of the receipt he was not suffering from any disability. He would, however, have violated Section 1202(a) by possessing a firearm following a felony conviction. See also *Scarborough* v. *United States*, *supra*, 431 U.S. at 564-566, 576 n.13; *id.* at 579 (Stewart, J., dissenting); *United States* v. *Robbins*, 579 F.2d 1151, 1154 (9th Cir. 1978); *United States* v. *Powers*, 572 F.2d 146, 151 n.5 (8th Cir. 1978); *United States* v. *McDaniel*, 550 F.2d 214, 219 (5th Cir. 1977); *United States* v. *Jones*, 533 F.2d 1387, 1391 (6th Cir. 1976), cert. denied, 431 U.S. 964 (1977).

Each provision also contains a slightly different interstate commerce element. In order to prove a violation of Section 922(h), the government must establish that the firearm in question at some time had moved in interstate commerce. *Barrett* v. *United States*, *supra*; see note 9, *supra*. Such proof will also satisfy Section 1202(a). *Scarborough* v. *United States*, *supra*. However, insofar as the latter statute requires only that the illegal activity "affect[] commerce," the receipt, possession, or transportation of a firearm that has never crossed state lines may still constitute a violation of Section 1202(a).

note 9, *supra*. See also 18 U.S.C. 922(e), 922(f) (prohibiting common carriers from knowingly transporting weapons in violation of Title IV).

See 431 U.S. at 571-572. Thus, a felon's receipt and subsequent use of an intrastate weapon to rob an interstate shipment of goods would probably be punishable under Section 1202(a) but not Section 922 (h). Cf. *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738 (1976).[18]

c. While the court of appeals may have thought it anomalous that Congress would enact two overlapping criminal statutes with different penalty provisions, it is the result reached in this case that creates serious anomalies. For example, if a person received a firearm while under indictment for murder, he would be subject to up to five years' imprisonment. If he received the gun one day later, when he had been convicted of the murder, the maximum penalty would be reduced to two years. Similarly a felon's receipt of a single bullet could lead to a five-year sentence while receipt of the firearm itself would be punishable by a maximum of two years' imprisonment. And a person who had

[18] As this Court recognized in *United States* v. *Bass*, *supra*, 404 U.S. at 345-346, Congress may well have intended that Section 1202(a) reach all possessions, receipts, and transportations of firearms by convicted felons and others without regard to proof of an effect on interstate commerce in individual cases. Because the language of Section 1202(a) was considered ambiguous on this point, the Court required that the government prove a minimal nexus with commerce in every case. Compare *Perez* v. *United States*, 402 U.S. 146 (1971). In short, the *Bass* decision rendered the difference between the commerce elements of Sections 922(h) and 1202(a) narrower than Congress perhaps intended, thereby increasing the overlap between the two statutes to some degree.

been adjudicated a mental incompetent would be subject only to the lesser sentence, whereas the person who had merely been temporarily committed to a mental institution sometime in the past could receive the greater sentence. Finally, we note that this decision would also undermine Congress' intent (as manifested in Section 924(a)) to punish equally persons prohibited from receiving firearms and the gun dealers that knowingly supply such persons. Compare 18 U.S.C. 922(d) with Section 922(h).

B. The Legislative History Demonstrates That Congress Intended That Title VII Complement And Not Override The Express Provisions Of Title IV

In view of the language and structure of the statutes under discussion, the decision of the court of appeals can be upheld only by clear evidence that the court's construction carries out the unequivocally demonstrated aims of Congress in enacting the legislation. In fact, however, the pertinent legislative history strongly confirms that Congress intended Section 924(a) and not Section 1202(a) to govern the range of punishment applicable to violations of Section 922(h).

As previously indicated, Sections 922 and 924 were enacted together as part of Title IV of the Omnibus Act. Section 1202(a) was simultaneously enacted as a separate part of the Omnibus Act (Title VII). Because Title VII was added as a last-minute floor amendment to the Omnibus Act, it is not discussed in the legislative reports. See *Scarborough* v. *United States*, *supra*, 431 U.S. at 569-570 & n.9; *United*

States v. *Bass*, *supra*, 404 U.S. at 344 & n.11. Nonetheless, the legislative debates in both houses clearly reflect Congress' understanding of the interrelationship of the two Titles. Senator Long, the sponsor of Title VII, stated that Section 1202(a) would "take nothing from" but rather "add to" Title IV. 114 Cong. Rec. 14774 (1968). See also *id.* at 16286 (remarks of Rep. Machen) ("Title VII * * * [is] a good complement to the gun-control legislation contained in title IV of this bill"). In light of these statements, this Court has previously recognized that "[t]he purpose of [Title VII] was to complement Title IV." *Scarborough* v. *United States*, *supra*, 431 U.S. at 573.

Four months after enacting the Omnibus Act, the same Congress considered and passed the Gun Control Act of 1968. This statute amended and reenacted both Title IV and Title VII, as well as the National Firearms Act (26 U.S.C. 5801 *et seq.*). The Gun Control Act and its accompanying reports treat the provisions of Titles IV and VII as independent and self-contained,[16] with no indication of congressional awareness that the penalty provisions of Section 1202(a) preempted to any extent any portion of Title IV. See Pub. L. No. 90-618, 82 Stat. 1213-1236; S. Rep. No. 1501, 90th Cong., 2d Sess. (1968).

[16] Title I of the Gun Control Act amended Title IV of the Omnibus Act, Title II amended the National Firearms Act, and Title III amended Title VII of the Omnibus Act.

In fact, Congress considered including a provision in the Gun Control Act that would have doubled the penalties provided by Section 924(a) to a maximum of ten years' imprisonment and a $10,000 fine (see S. Rep. No. 1501, *supra*, at 21, 37), although this provision was ultimately rejected in conference. H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. 31 (1968).[17] Again the legislative history makes no reference to any impact of Section 1202(a) on the penalties that could be imposed under Section 924(a)—surely a most extraordinary omission if the court of appeals' ruling in this case were a correct reflection of congressional intent.[18]

C. The Doctrines Of Lenity, Implied Repeal, And Avoidance Of Constitutional Questions Do Not Justify The Court Of Appeals' Reconstruction Of The Federal Gun Laws

Notwithstanding the clarity of congressional design evidenced by the language, structure, and legislative history of Titles IV and VII, the court of appeals concluded that Section 1202(a) overrides Section 924(a) with regard to the penalty that may be imposed on defendants whose conduct violates both

[17] Congress did, however, amend the parole eligibility requirement found in Section 924(a). See Section 102 of the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1224; H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. 31 (1968).

[18] Subsequent legislative history is generally less persuasive than contemporaneous reports and debates. But here, the same Congress passed both the Gun Control Act and the Omnibus Act, and the same House and Senate Committees issued the relevant reports.

titles. The court justified this interpretation of the federal gun laws by reference to three maxims of statutory construction. First, the court invoked the principle "that ambiguity concerning the interpretation of criminal legislation should be resolved in favor of lenity" (Pet. App. 7a). Second, the court indicated that insofar as Title VII came after Title IV, it effected an implied partial repeal of Section 924(a) (*id.* at 7a-8a). Finally, acknowledging that "these first two principles cannot be applied to these facts without some difficulty" (*id.* at 8a), the court primarily relied on the doctrine that the courts will adopt a reasonable construction of a statute if that interpretation avoids a serious constitutional question. However, none of these three canons of statutory construction justifies the result in this case.

1. On a number of occasions this Court has stated and applied the principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis* v. *United States*, 401 U.S. 808, 812 (1971). See, *e.g.*, *Simpson* v. *United States*, 435 U.S. 6, 14 (1978); *United States* v. *Bass*, *supra*, 404 U.S. at 347; *Bell* v. *United States*, 349 U.S. 81, 83 (1955). "This rule of narrow construction is rooted in the concern of the law for individual rights, and in the belief that fair warning should be accorded as to what conduct is criminal and punishable by deprivation of liberty or property." *Huddleston* v. *United States*, *supra*, 415 U.S. at 831. It is equally well-established, however, that the touchstone of the doctrine of lenity is the existence of a "grievous

ambiguity or uncertainty in the language and structure of the [criminal statute in question]." *Ibid;* see, *e.g.*, *Scarborough* v. *United States*, *supra*, 431 U.S. at 577; *Barrett* v. *United States*, *supra*, 423 U.S. at 217-218; *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820). No such ambiguity exists here.

Respondent unquestionably violated Section 922(h),[19] and Section 924(a) unambiguously specifies the punishment that may be imposed for that violation: "Whoever violates any provision of this chapter [*i.e.*, Section 922] * * * shall be fined not more than $5,000, or imprisoned not more than five years, or both * * *." Section 1202(a), on the other hand, is the core provision of an independent, albeit complementary, federal gun control statute, that was designed to "take nothing from" but rather "add to" Title IV. 114 Cong. Rec. 14774 (1968) (remarks of Sen. Long). See *Scarborough* v. *United States*, *supra*, 431 U.S. at 573. As we have shown above, the language, structure, and legislative history of the Omnibus and Gun Control Acts unequivocally manifest congressional intent to punish violators of Section 922(h) by up to five years' imprisonment. And where there is no ambiguity, "there is no justification for indulging in uneasy statutory construction." *Barrett* v. *United States*, *supra*, 423 U.S. at 217. As this Court has often stated, "[e]ven penal laws * * * ought not to be construed so strictly as to defeat the obvious

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[19] Respondent does not contend that Section 922(h) fails to give adequate notice of the conduct prohibited.

intention of the legislature." *American Fur Co.* v. *United States*, 27 U.S. (2 Pet.) 358, 367 (1829); see, *e.g.*, *Huddleston* v. *United States*, *supra*, 415 U.S. at 831; *United States* v. *Bramblett*, 348 U.S. 503, 509-510 (1955); *United States* v. *Morris*, 39 U.S. (14 Pet.) 464, 475 (1840); *United States* v. *Wiltberger*, *supra*.

2. Similarly inappropriate is the court of appeals' primary reliance on the principle that statutes should be construed to avoid serious constitutional questions. In point II, *infra*, we contend that respondent's constitutional claims concerning overlapping criminal statutes with differing penalties are insubstantial, in which case there would be no colorable basis for applying the avoidance principle. See *Huddleston* v. *United States*, *supra*, 415 U.S. at 833. Moreover, even if the constitutional concerns were substantial, the court of appeals could not properly avoid addressing them by rewriting the plain terms of the federal gun laws. "[R]esort to an alternative construction to avoid deciding a constitutional question is appropriate only when such a course is 'fairly possible' or when the statute provides a 'fair alternative' construction." *Swain* v. *Pressley*, 430 U.S. 372, 378 n.11 (1977); see *Shapiro* v. *United States*, 335 U.S. 1, 31 (1948); *United States* v. *Sullivan*, 332 U.S. 689, 693 (1948); *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). For obvious reasons, the court of appeals failed to explain how the word "five" in Section 924(a) is ambiguous or how it could fairly be con-

strued to mean "two." In fact, the language, structure and legislative history of Titles IV and VII, described in detail above, "leave[] no reasonable alternative." *United States* v. *Five Gambling Devices*, 346 U.S. 441, 448 (1953). Accordingly, just as in *Swain* v. *Pressley*, *supra*, the principle that an ambiguous statute should be construed to avoid constitutional issues has no proper application here.

3. The court of appeals also suggested (Pet. App. 7a-8a) that Section 1202(a) had effected an implied repeal of Section 924(a). That assertion does not withstand close analysis. At the outset we note the cardinal rule that repeals by implication are disfavored. See, *e.g.*, *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 154 (1976); *Morton* v. *Mancari*, 417 U.S. 535, 549 (1974); *Universal Interpretive Shuttle Corp.* v. *Washington Metropolitan Area Transit Commission*, 393 U.S. 186, 193 (1968). The legislative intent to repeal must be clearly manifest in the " 'positive repugnancy between the provisior of the new law, and those of the old.' " *United States* v. *Borden Co.*, 308 U.S. 188, 199 (1939). See, *e.g.*, *Rosenberg* v. *United States*, 346 U.S. 273, 294-295 (1953) (Clark, J., concurring); *United States* v. *Gilliland*, 312 U.S. 86, 95 (1941); *Posadas* v. *National City Bank*, 296 U.S. 497, 503-504 (1936). There is, however, no repugnancy between Titles IV and VII. Rather, as is evident from the legislative history and the differing coverage of the two Titles described above, Sections 922(h) and 1202(a) not only coexist, but actually complement one another.

See also *Scarborough* v. *United States*, *supra*, 431 U.S. at 573. In such circumstances, "it is the duty of the courts * * * to regard each [statute] as effective." *Morton* v. *Mancari*, *supra*, 417 U.S. at 551. Accord, *e.g.*, *Radzanower* v. *Touche Ross & Co.*, *supra*, 426 U.S. at 155; *Edwards* v. *United States*, 312 U.S. 473, 484 (1941); *United States* v. *Gilliland*, *supra*.[20]

Moreover, it is not readily apparent how one of two simultaneously enacted provisions could impliedly repeal the other.[21] Recognizing this difficulty, the court of appeals pointed out that Section 922(h) was derived in part from the Federal Firearms Act, ch. 850, 52 Stat. 1250, and that Title VII was added as an amendment to the bill that originally contained Title IV. But surely the doctrine of implied repeal depends upon one statute being *enacted* after another and not on the source or time of drafting. See *United States* v. *Borden Co.*, *supra*; *Posadas* v. *National City Bank*, *supra*; cf. *United States* v. *Moore*, 423 U.S. 122, 132-133 (1975).[22]

[20] We further note that the presumption against implied repeals is particularly strong in the case of criminal statutes. See Note, *The Rosenberg Case: Some Reflections on Federal Criminal Law*, 54 Colum. L. Rev. 219, 251 (1954).

[21] As previously stated, Sections 922, 924 and 1202 were enacted at the same time as the Omnibus Act.

[22] Moreover, Congress specifically reconsidered the five-year maximum penalty provided by Section 924(a) and subsequently reenacted that section with slight modification in the Gun Control Act of 1968. See page 25, *supra*. This reenactment wholly defeats any argument that Congress intended to or did partially repeal Section 924(a) by implication.

II. OVERLAPPING CRIMINAL STATUTES WITH DIFFERENT PENALTY PROVISIONS DO NOT DENY DEFENDANTS DUE PROCESS OF LAW

The court of appeals held that the sentencing provisions of Section 1202(a) supplant the express terms of Section 924(a) for offenses that violate both Title IV and Title VII of the Omnibus Act. In deciding this statutory question, the court stated that it had "serious doubts about the constitutionality of two statutes that provide different penalties for identical conduct" (Pet. App. 16a). Specifically, the court suggested (1) that the statutes might be void for vagueness (Pet. App. 9a), (2) that the existence of two such similar statutes with dissimilar sentencing provisions would implicate "the due process and equal protection interest in avoiding excessive prosecutorial discretion" (*ibid.*), and (3) that such a statutory overlap raised separation of powers and delegation of authority problems (*id.* at 10a-16a). As we now show, the statutory overlap here is not unconstitutional for any of these reasons; indeed, we think it is fair to characterize these concerns as insubstantial.

A. Title IV Is Not Void For Vagueness

There is no merit to the contention that Title IV, analyzed either as a separate statute or as an independent component of the federal gun laws, is unconstitutionally vague. Viewed by itself, Title IV is a clear and specific criminal statute. Section 922(h) sets forth with precision the categories of individuals who are prohibited from receiving firearms that have

traveled in interstate commerce. For example, Section 922(h)(1) clearly forbade respondent, who had previously been convicted of murder, from receiving the pistol in question. Concomitantly, Section 924(a) provides the exact range of punishment deemed by Congress to be appropriate for violations of Section 922(h)—here, five years' imprisonment. Neither respondent nor the court of appeals has suggested any word or phrase in these criminal provisions that is elusive or ambiguous. See *Colautti* v. *Franklin*, No. 77-891 (Jan. 9, 1979), slip op. 11-17. In short, Title IV "give[s] a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States* v. *Harriss*, 347 U.S. 612, 617 (1954); see *Colautti* v. *Franklin*, *supra*, slip op. 11; *United States v. Powell*, 423 U.S. 87, 92-94 (1975).

Nor is a valid criminal statute rendered void merely because it covers in part the same conduct proscribed by a different statute carrying a lesser penalty. Criminal statutes commonly overlap, and such overlaps are to some extent desirable. For instance, such overlaps help assure that culpable individuals will be less able to evade prosecution by planning their activities to fall between gaps that might otherwise be created by provisions without any overlap. Moreover, overlaps in coverages are in part an inevitable result of the limitations of language, as well as being a product of the attempt of the criminal law to punish similarly situated people alike while simultaneously meeting out individualized justice to different gradations and types of crime. See Rosett, *Discretion, Severity and Legality in Criminal Justice*, 46 S. Cal. L. Rev. 12, 20 (1972).

In any event, regardless of whether overlapping coverages are desirable, the fact that a person's conduct violates several criminal statutes cannot possibly lessen the notice afforded by particular statutes. If a statute is void for vagueness simply because identical proof of particular conduct would violate more than one statute, the federal and state criminal codes would be riddled with void provisions.[23]

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[23] For example, proof that a person submitted a false statement to the Department of Housing and Urban Development would establish a violation of both 18 U.S.C. 1001 and 18 U.S.C. 1010. The former statute carries a five-year maximum penalty, the latter only two years. Section 1001 similarly overlaps with numerous other provisions carrying different penalties. See, *e.g.*, 18 U.S.C. 287, 288, 289, 1012, 1019, 1546; 26 U.S.C. 7206, 7207; and 42 U.S.C. 408, 1395nn. Nonetheless, the courts of appeals have uniformly concluded as a matter of statutory interpretation and constitutional law that a defendant may be prosecuted and sentenced under any of the overlapping provisions. See, *e.g.*, *United States* v. *Gordon*, 548 F.2d 743 (8th Cir. 1977); *United States* v. *Radetsky*, 535 F.2d 556, 567-568 (10th Cir.), cert. denied, 429 U.S. 820 (1976); *United States* v. *Smith*, 523 F.2d 771, 780 (5th Cir. 1975), cert. denied, 429 U.S. 817 (1976); *United States* v. *Matanky*, 482 F.2d 1319 (9th Cir.), cert. denied, 414 U.S. 1039 (1973); *United States* v. *Eisenmann*, 396 F.2d 565, 567-568 (2d Cir. 1968). See also *United States* v. *Gilliland*, *supra*.

Analogous overlaps characterized by different potential punishments abound throughout the United States Code. Thus, perjury before a court may violate both 18 U.S.C. 1621(1) and 1623(a). Bribery using the mails may violate both 18 U.S.C. 1341 and 1952. *E.g.*, *United States* v. *Hall*,

Moreover, the major premise of the court of appeals' analysis concerning the identity of elements between Sections 922(h) and 1202(a) is incorrect. While we believe that the Due Process Clause would not bar Congress from enacting two statutes that word for word prohibit the same conduct but nevertheless have different punishment provisions,[24] that issue is not even posed here. Sections 922(h) and 1202(a) are far from identical, even though with regard to the instant case the government's proof sufficed to establish a violation of both provisions. As we have shown in point I(A)(2), *supra*, each statute covers different categories of individuals and prohibits different kinds of conduct, and the requisites for proving the offenses are somewhat different even in the case of the receipt of firearms by convicted felons. See pages 19-21, *supra*.

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536 F.2d 313 (10th Cir.), cert. denied, 429 U.S. 919 (1976). The willful filing of a false tax return constitutes both a felony (26 U.S.C. 7206) and a misdemeanor (26 U.S.C. 7207). See *United States* v. *Bishop*, 412 U.S. 346 (1973); *Berra* v. *United States*, 351 U.S. 131 (1956); see also *Sansone* v. *United States*, 380 U.S. 343 (1965); *United States* v. *Beacon Brass Co.*, 344 U.S. 43 (1952); *United States* v. *Noveck*, 273 U.S. 202 (1927). There are many other examples too numerous to list.

[24] See, *e.g.*, *United States* v. *Jones*, 527 F.2d 817, 820 (D.C. Cir. 1975); *United States* v. *Smith*, *supra*; *People* v. *Eboli*, 34 N.Y. 2d 281, 313 N.E. 2d 746 (1974); *People* v. *McCollough*, 57 Ill. 2d 440, 313 N.E. 2d 462 (1974); cf. *Bell* v. *United States*, *supra*, 349 U.S. at 82.

B. The Prosecutor's Discretion To Charge Cases Such As Respondent's Under Either Section 922(h) Or Section 1202(a) Does Not Violate The Constitution

The court of appeals suggested (Pet. App. 10a-12a) that the overlap of Sections 922(h) and 1202(a) raises questions of excessive prosecutorial discretion. However, as this Court has recently reiterated, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978) (footnote omitted). See *United States* v. *Nixon*, 418 U.S. 683, 693 (1974); *Rosenberg* v. *United States*, 346 U.S. 273, 294 (1953) (Clark, J., concurring) (opinion joined by five other members of the Court); *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 45-46 (1952); *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868). Thus it is well settled that unless the exercise of discretion is "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification," "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962), quoted with approval in *Bordenkircher* v. *Hayes*, *supra*. Accord, *United States* v. *Bell*, 506 F.2d 207, 221-222 (D.C. Cir. 1974). See generally Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 Colum. L. Rev. 1103 (1961). Neither the

court of appeals nor respondent has suggested that this prosecution was based on improper factors.

Underlying the pronounced judicial deference to prosecutorial decisions regarding the selection and institution of charges is the constitutional doctrine of separation of powers. See, *e.g.*, *United States* v. *Nixon*, *supra*; *Inmates of Attica Correctional Facility* v. *Rockefeller*, 477 F.2d 375, 379-380 (2d Cir. 1973); *United States* v. *Bland*, 472 F.2d 1329, 1335 (D.C. Cir. 1972); *United States* v. *Cox*, 342 F.2d 167, 171 (5th Cir.) (en banc), cert. denied, 381 U.S. 935 (1965). Article II, Section 3 of the Constitution charges the Executive Branch with the duty to "take Care that the Laws be faithfully executed * * *." The Attorney General, on behalf of the President, has the specific obligation to enforce the federal criminal laws. 28 U.S.C. 515, 516. These provisions strongly suggest the inappropriateness of judicial review of the government's prosecutorial decisions, except upon some showing that the decisional process was tainted by unconstitutional factors.

Furthermore, judicial deference in this area reflects the reality that "the manifold imponderables which enter into the prosecutor's decision to prosecute or not to prosecute make the choice not readily amenable to judicial supervision." *Inmates of Attica Correctional Facility* v. *Rockefeller*, *supra*, 477 F.2d at 380. In deciding whether to prosecute and what violations to charge, the prosecutor properly considers a plethora of factors, including allocation of prosecutorial re-

sources,[25] the strength of the case,[26] and the justice and urgency of prosecution in particular cases.[27] As

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[25] *E.g.*, *Smith* v. *United States*, 375 F.2d 243, 247 (5th Cir. 1967); Rosett, *Discretion, Severity and Legality in Criminal Justice*, 46 S. Cal. L. Rev. 12, 21-23 (1972); Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 Colum. L. Rev. 1103, 1119 (1961). An evaluation of prosecutorial resources involves whether a particular individual is more properly prosecuted by state rather than federal authorities, as well as whether the individual warrants prosecution at all. See Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 Law & Contemp. Prob. 64 (1948).

[26] Rosett, *supra* note 25, at 21; Comment, *supra* note 25, at 1119; Schwartz, *supra* note 25, at 84.

[27] Prosecutorial discretion is necessary both to evaluate the cases most appropriate for immediate prosecution because of the wanton disregard for societal values evidenced by a particular defendant, and to alleviate harshness and render rough justice for defendants whose conduct falls on the less censurable end of the spectrum of wrongdoing. See Breitel, *Controls in Criminal Law Enforcement*, 27 U. Chi. L. Rev. 427-432 (1960); Schwartz, *supra* note 25, at 84; Rosett, *supra* note 25, at 25. The ABA Project on Standards for Criminal Justice, *The Prosecution Function and the Defense Function* § 3.9 (Approved Draft 1971), summarizes the various considerations as follows:

> (a) In addressing himself to the decision whether to charge, the prosecutor should first determine whether there is evidence which would support a conviction.
>
> (b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that evidence exists which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his discretion are:

Mr. Chief Justice (then Judge) Burger has observed (*Newman* v. *United States*, 382 F.2d 479, 480 (D.C. Cir. 1967)): "Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought."

In light of the well established and wide ranging discretion of prosecutors in matters relating to the charging decision, the court of appeals' concern about the constitutionality of the prosecutor's discretion to choose between the two statutes in this case is without substance. The Constitution is not offended by the power of the Executive to decide whether to prosecute a case or to forego prosecution altogether. See *Inmates of Attica Correctional Facility* v. *Rockefeller, supra; United States* v. *Cox, supra.* Similarly, the prosecutor, consistent with due process of law, has untrammeled power to charge a greater offense rather than a lesser degree of that offense, or vice versa. See

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(i) the prosecutor's reasonable doubt that the accused is in fact guilty;

(ii) the extent of the harm caused by the offense;

(iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;

(iv) possible improper motives of a complainant;

(v) prolonged non-enforcement of a statute, with community acquiescence;

(vi) reluctance of the victim to testify;

(vii) cooperation of the accused in the apprehension or conviction of others;

(viii) availability and likelihood of prosecution by another jurisdiction.

* * * * *

Newman v. *United States, supra*, 382 F.2d at 481 & n.5. Indeed, when faced with evidence that several individuals are involved in an offense, the prosecutor may constitutionally charge some but not others or charge different degrees of that offense against different individuals. *Id.* at 481-482; *United States* v. *Bell*, 506 F.2d 207, 221-222 (D.C. Cir. 1974). Nor does the Constitution limit the prosecutor's power to charge an individual with all or some lesser number of the offenses he has allegedly committed or, during the course of plea bargaining, to drop or threaten to add charges. See *Bordenkircher* v. *Hayes, supra.* So long as the prosecutor does not base his decisions on invidiously discriminatory grounds, the exercise of his broad discretion over the various aspects of the charging decision will not violate the Constitution.[28]

The foregoing enumeration of prosecutorial powers illustrates what this Court has previously made clear: Our constitutional system allows a prosecutor to select between two statutes, applicable to the same conduct but carrying different penalties. See, *e.g.*,

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[28] Respondent had many prior convictions, including one for murder in 1960 (A. 11-13). Following that offense, he served approximately 13 years of his 25-year sentence. Within two years of his release, he was openly selling illicit firearms and boasting that the government was unaware of his activities (Tr. 60-67). Although the prosecutor's decision to indict respondent under Section 922(h) is not subject to judicial review in the absence of a showing that his decision was improperly motivated, we suggest that the foregoing circumstances of respondent's offense undoubtedly prompted the government's election in this case, as well as the district court's decision to impose a five-year sentence.

ibid.; *United States* v. *Nixon*, *supra*; *Rosenberg* v. *United States*, *supra*; *United States* v. *Beacon Brass Co.*, *supra*. The court of appeals' contrary conclusion relies primarily on Mr. Justice Black's dissent in *Berra* v. *United States*, 351 U.S. 131, 135-140 (1956) (Pet. App. 9a-10a). But Mr. Justice Black premised his observations on the existence of two identical statutes carrying different maximum penalties. 351 U.S. at 139. And here, as we have previously established, Sections 922(h) and 1202(a) are far from identical. See point I(A)(2), *supra*.[29] Moreover, even if those two gun law provisions were identical, neither logic nor precedent supports Justice Black's position. See, *e.g.*, *United States* v. *Jones*, 527 F.2d 817, 820 (D.C. Cir. 1975); *United States* v. *Smith*, 523 F.2d 771, 780 (5th Cir. 1975), cert. denied, 429 U.S. 817 (1976); *United States* v. *Librach*, 520 F.2d 550, 556 (8th Cir. 1975), cert. denied, 429 U.S. 939 (1976); *Hutcherson* v. *United States*, 345 F.2d 964, 967 (D.C. Cir.), cert. denied, 382 U.S. 894 (1965); *id.* at 969 (Burger, J., concurring); *People* v. *Eboli*, 34 N.Y. 2d 281, 313 N.E. 2d 746 (1974); *People* v. *McCollough*, 57 Ill. 2d 440, 313 N.E. 2d 462 (1974). Cf. *Spies* v. *United States*, 317 U.S. 492, 497 (1943)

[29] In *Berra*, a majority of the Court construed two sections of the Internal Revenue Code of 1939 to cover "precisely the same ground" despite the difference in penalties applicable to the two sections. 351 U.S. at 134. The Court did not, however, reach any questions concerning the constitutionality of sentencing the defendant under the felony provision rather than the misdemeanor statute.

(indicating that identical statutes might be "unusual" but not unconstitutional).[30]

C. Section 924(a) Does Not Constitute An Unconstitutional Delegation Of Congress' Duty To Affix Punishment

Finally, the court of appeals indicated (Pet. App. 10a-11a) that the overlap between Sections 922(h)

[30] It is not readily apparent why the prosecutorial discretion incident to the existence of identical statutes with different penalty provisions differs, for purposes of constitutional analysis, from the firmly established prosecutorial discretion to choose one criminal statute over another even though the government's proof in a particular case would be identical. For example in *Rosenberg* v. *United States*, *supra*, Mr. Justice Clark, on behalf of six members of the Court, stated that the government could constitutionally prosecute a defendant under the Espionage Act of 1917 rather than the Atomic Energy Act of 1946, even though the government's proof and the elements of the crime would be the same with regard to a defendant whose espionage concerned atomic secrets. And at issue in that case was the trial court's unilateral imposition of the death penalty under the Espionage Act—a penalty not available under the Atomic Energy Act without a recommendation of the jury based upon specific additional findings.

Furthermore, the existence of Section 1202(a) inures to the benefit of defendants generally. If Congress had enacted Section 922(h) alone, as it originally intended, the prosecutor unquestionably could choose to prosecute, thereby subjecting a defendant to five years' imprisonment. That the prosecutor actually has the option to proceed under Section 1202(a) can only reduce some defendants' potential liability insofar as they would otherwise be subject to five years' imprisonment. (It is implausible that a prosecutor who decided to prosecute under Section 1202(a) would not have prosecuted at all if only Section 922(h) existed.) Of course, the trial court retains the power to give a sentence of two years or less under either statute.

and 1202(a) somehow may amount to an unconstitutional delegation to the Executive Branch of Congress' responsibility to establish penalties for violations of the criminal laws. Initially we note that this point does not appear to differ in essence from the court's concern about excessive prosecutorial discretion. In any event, whatever vitality the doctrine of unconstitutional delegation may currently retain (see generally McGowan, *Congress, Court, and Control of Delegated Power*, 77 Colum. L. Rev. 1119, 1127-1130 (1977)), it is certainly not applicable here. Section 922(h) unquestionably prohibited respondent from receiving a firearm that had traveled in interstate commerce, and Section 924(a) explicitly sets forth the range of penalties deemed by Congress to be appropriate for violations of Section 922(h).[31] In short, Congress properly and expressly exercised its power to define criminal activity and to affix punishment therefor; it did not leave the courts to guess at either the conduct prohibited or the appropriate range of penalties. Compare *United States* v. *Evans*, 333 U.S. 483 (1948).[32]

If anything, it is the court of appeals' decision, and not the overlap between Sections 922(h) and 1202(a), that raises serious questions concerning the appropriate roles of the coordinate branches of govern-

[31] At the same time, Section 1202(a) defines a separate, albeit similar, crime and the applicable punishment.

[32] Respondent does not contend that the five-year maximum penalty constitutes cruel and unusual punishment in violation of the Eighth Amendment.

ment. The unwarranted reconstruction of the federal gun laws effected by the court below substantially trenches upon Congress' broad discretion to enact criminal laws and to affix the appropriate range of punishments. See, *e.g.*, *Bell* v. *United States*, *supra*, 349 U.S. at 82. In addition, insofar as the decision calls into question the prosecutor's traditional discretion to charge one crime rather than another, it infringes the Executive's constitutional duty to enforce the laws. Congress has specified that violations of Section 922(h) are punishable by up to five years' imprisonment, and the federal prosecutor properly decided to proceed against respondent under Section 922(h). Following conviction, the district court determined that it was appropriate to sentence respondent to five years' imprisonment in light of respondent's history and the circumstances of the offense. See note 28, *supra*. There is no justification for the court of appeals' interference with these wholly appropriate exercises of power.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MARCH 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 287764 350